IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

WEDNESDAY, THE 28TH FEBRUARY 2007 / 9TH PHALGUNA 1928

SA.No. 713 of 1999(B)

AS.113/1994 of PRINCIPAL SUB COURT,ERNAKULAM dated 22/1/1999
OS.221/1992 of I ADDL.M.C.,ERNAKULAM
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APPELLANT: RESPONDENT:PLAINTIFF:

A.G.ANNIE ELIZABATH,
W/O. K.T.VINCENT, RESIDING AT
KOOTTAMPARAMBIL HOUSE,
MONASTRY ROAD, ERNAKULAM,
KOCHI – 17.

BY ADV. SRI.T.B.THANKAPPAN
SRI.V.P.RAMESAN
SMT.K.DEEPA
SRI.R.SABU

RESPONDENT:APPELLANT:DEFENDANT:

MARY PHILOMINA,
W/O.JOSEPH, RESIDING AT ARAKKAPARAMBIL HOUSE,
VALLARPADOM, KANAYANNUR TALUK,
ERNAKULAM DISTRICT.

BY ADV. SRI.S.K.BRAHMANANDAN
SRI.G.SREENIVASA PRABHU
SRI.S.B.PREMACHANDRA PRABHU

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 28/02/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.N. KRISHNAN, J.

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S.A. NO. 713 OF 1999

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Dated this the 28th day of February, 2007.

J U D G M E N T

This is an appeal preferred against the judgment and decree in A.S. 113/94 of the Principal Sub Judge, Ernakulam. The said appeal was preferred against the judgment and decree in O.S.221/92 of the I Addl. Munsiff, Ernakulam. The suit is one for partition. The plaintiff and defendant are daughters of one Raphel George. Raphel George obtained the plaint schedule properties as per a partition deed of the year 1950 well described so in D schedule of the said document. He had also purchased other properties. He died on 25/6/87. He left behind 22 cents with the family house which devolved upon the plaintiff and defendants equally and it is the plaint schedule property. The plaintiff seeks equal division of the said property. The defendant would contend that the suit is not entitled to be decreed and when the defendant's marriage reached a point of finalisation, the plaintiff and her husband insisted that the defendant should execute a sale deed in respect of 22 and 2/3 cents of property in favour of the

plaintiff, as a condition precedent for co-operating in the marriage. There was also an understanding that the plaintiff would execute a release deed with respect to the plaint schedule property in favour of the defendant and expecting the same the defendant had spent an amount of Rs.40,000/- for the repairs of the building. But the plaintiff did not fulfil her part of the promise and therefore the plaintiff is not entitled to any reliefs as prayed for.

2. In the trial court PW1 and DWs.1 to 3 were examined. Exts.A1 to A8 and B1 to B7 were marked. On an analysis of the entire materials the trial court granted a decree in favour of the plaintiff directing the property to be divided into two equal shares and to allot one share each to plaintiff and defendant and the plaintiff was also directed to pay a sum of Rs.10,000/- towards expenses incurred by the defendant for the repair of the house and also a direction for mesne profits. Against that decision an appeal was preferred before the learned Subordinate Judge, Ernakulam who by his judgment allowed the appeal and dismissed the suit. It is against that decision the present second appeal is filed.

3. The following two substantial questions of law arise for

consideration in the appeal:

"(1) Is it not illegal for the lower Appellate Court to deny the legal right of the plaintiff to get partition of the ancestral property by misconstruing a sale deed relating to some other property relying on the oral testimony of the defendant?

(2) Is it not illegal for the lower Appellate Court to hold that a sale deed of 1988 as a family arrangement, in the absence of a transaction between members of the family either in the character of partition or settlement which is a very requisite for a valid family arrangement to apply the principle of Estoppel as contemplated under Section 115 of the Evidence Act from claiming plaintiff's share in the plaint schedule property over which both the plaintiff and the defendant got right by devolution on the demise of their mother in 1991."

Points 1 and 2:

4. The point that arises for determination in the second appeal is whether the Appellate Court has totally gone beyond the pleadings of the case of the defendant to non-suit the plaintiff.

5. It is true that in a case which is coming up for hearing at the second appellate stage the second appellate Court is not expected to act as a third Court on facts but when there is a total mis-application of law and non-appreciation of vital materials that may have to be considered. So, certainly, the Court is competent to look into the question and correct the error in order to give substantial justice to the parties. The document relied upon by the defendant in this case is Ext.B1. It is an assignment deed executed by the defendant in favour of the plaintiff. A reading of the said document would reveal that the defendant had obtained the property by virtue of a settlement deed of the year 1979 and that she is in continuous enjoyment and possession of the property and that she is assigning her right for a consideration of Rs.5,000/- and that she had received the same and transferred all her right, title and possession over the plaint schedule property in favour of the present plaintiff. There is absolutely no whisper regarding any family settlement or arrangement or even that the execution of the said document was necessitated on account of some difference of opinion between the parties. Suppose a document is to be construed as a family arrangement there must be consensus ad idem of the parties and at that relevant point of

time the mother was also alive and her junction was also necessary to have a family arrangement.

6. Now it is worthwhile to refer to the written statement filed by the defendant. There is absolutely no whisper regarding any family arrangement in the written statement. What is stated is that to perform the marriage there was some necessity and a document happened to be executed in the name of the plaintiff and there was a reciprocal promise by the plaintiff that she would execute a release deed with respect to her right in the plaint schedule property in favour of the defendant and thereby there will be a mutual exchange of rights of the property.

7. At the out set I may like to state that the property covered by B1 is not a joint property owned by the plaintiff and the defendant. It was a property which belonged exclusively to the defendant and she had transferred the said property for valid consideration in favour of the plaintiff. So, the question of satisfying the reciprocal rights of the parties does not arise at all at the time of execution of Ext.B1. Even if it is admitted for argument sake that there was any semblance of agreement of that nature, under ordinary circumstances, the person who is entitled to get such a right certainly would have approached the

competent Court for redressal of the grievance. Now, what is stated is only as a reply to the plaint and the defendant has not moved her little finger to get her so called right enforced by virtue of a decree of a Court or otherwise. It is in this background the judgment of the Appellate Court has to be considered.

8. It is a well settled principle that a civil case particularly should be governed by the respective pleadings of the parties. The parties may develop a different case at the stage of trial but the Court is not expected to consider the same. At the most, what the Court should have considered was to find out whether there was an agreement between the plaintiff and the defendant that the plaintiff should surrender her right with respect to the plaint schedule property in favour of the defendant. Except for the statement filed before the Court there is no convincing evidence and just because a person's marriage is to be celebrated there is no necessity to execute a document for the said purpose. The mother who was also a legal heir was nowhere in the picture at the time of the alleged agreement between the parties. The Appellate Court had extracted a sentence from the evidence of DW1 with respect to Ext.B1 wherein it is stated that the document was taken for the purpose of getting right over the property and

that she wants further right. There is absolutely no such recital in the document and the learned counsel for the appellant argued that an isolated sentence in the evidence should not be taken as a conclusive admission to establish a point. The learned counsel is perfectly right and there is no case for the plaintiff anywhere in the plaint that Ext.B1 was executed in lieu of getting her share over the property. What is referred to in the plaint is the averment in the reply notice and nothing else. So the Appellate Court's conclusion merely basing on a solitary sentence which is not supported by any substantial materials has to be ignored. From these discussions, I hold that the approach of the lower Appellate Court is totally erroneous whereas the trial court has approached the matter in the proper, legal perspective and arrived at a decision that the plaint schedule property is partible. It is also interesting to note that issues raised in the case never spells out any case of family arrangement which is relied on by the learned Appellate judge to non-suit the plaintiff. So the finding of the Appellate Court is against the evidence, against the materials, against law and therefore, it calls for interference at the hands of this Court. On the contra, the learned Munsiff had applied his mind to the facts, evidence and law and had arrived at a decision

regarding the partibility of the property. It has to be stated that the property jointly belonged to two persons. On the death of their parents unless there is definite concrete evidence regarding the surrender or extinguishment of right of one of the persons, it cannot be held that the said properties are not partible. Therefore, I hold that the properties are partible as held by the trial court.

9. The learned counsel for the respondent has taken a very strong contention that the relationship between the parties being sisters and the execution of Ext.B1 came under peculiar circumstances it has to be inferred that the case of an oral relinquishment contended by the defendant has to be accepted. He has also relied upon the decisions reported in *Damodaran Kavirajan v. T.D. Rajappan (AIR 1992 Ker. 397), Ramdas v. Pralhad(AIR 1965 Bombay 74) and Venku Bai v. Raju Bair & others(1987 (1) Current Civil cases 878)* to canvass for the position that oral relinquishment is permissible under law and it does not require registration and necessity to register will arise only if it is reduced it into a form of writing. There cannot be any dispute with respect to the settled position of law. But, what has to be considered and looked into by the Courts are the pleadings

of the parties and the issue that arise for determination. At no point of time there has been pleadings to the effect that there had been an oral relinquishment of right by the plaintiff over the property. It is also to be remembered that the so called oral relinquishment takes place at a point of time when the mother was also alive. If there was no difficulty for the parties to execute Ext.B1 document when they had come to understand regarding the terms of transfer of the property there was nothing preventing the defendant from getting a document executed by the plaintiff in her favour at that point of time. After lapse of years, adducing some oral evidence to show that there was a probability of an oral relinquishment cannot be accepted by a Court of law and therefore the contention of the learned counsel for the respondent cannot be accepted.

10. The next question to be considered is regarding the value of the house and also the question of equity. The learned Munsiff found that there had been repairs effected by the defendant and there is a direction in the decree to give Rs.10,000/- to the defendant for the same. It does not require any interference at all and justice has been made out to the defendant. It is also to be stated that if the defendant is not

having any house and the plaintiff is having any house the Court while considering the final decree application can consider that point and allot the house to the defendant after valuation. It is a matter that has to be considered by the final decree Court depending upon the materials and other particulars available before it especially after the visit of the Commissioner to partition the suit property. So far as the mesne profits is concerned final decree Court shall decide and the defendant is liable to pay and the claim will be decided at that stage.

11. In the result, the appeal is allowed and the decree of the lower Appellate Court is set aside and that of the trial court is restored and the plaintiff is given a decree for partition as follows:

(1) The plaint schedule property is to be divided into two equal shares and one such share to be allotted to the share of the plaintiff. Defendant shall be allowed remaining share if she pays proper Court fee.

(2) The plaintiff is liable to pay Rs.10,000/- to the defendant towards the repair charges effected by the defendant to the family house.

(3) The question of allotting the house to the defendant to be decided in the final decree proceedings.

(4) The plaintiff is also entitled to the mesne profits from the defendant and the quantum can be decided at the stage of final decree proceedings.

(5) The plaintiff is at liberty to apply for final decree proceedings though the costs of the suit as well as the appeal shall come out of the estate.

M.N. Krishnan, Judge.

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M.N. KRISHNAN, J.
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28th February, 2007.